



CHANGES INTRODUCED BY THE COMPANY LAW ORDINANCE, 2018

In 2013, India adopted a new company law regime under the Companies Act, 2013 (the “**Act**”) and the rules there under, which have been amended from time-to-time. This update discusses the changes introduced by the Companies (Amendment) Ordinance Act, 2018 (the “**Ordinance**”) with effect from November 2, 2018. As the Ordinance did not get approved by the Indian Parliament in its recent legislative session as required, it has been revalidated on January 12, 2019 and continues to be in effect.

Changes relating to significant beneficial ownership

In 2017, the concept of “significant beneficial owners” was introduced, and it was necessary to report “beneficial interest” of an individual, company, partnership or a trust in the shares of a company. Thereafter, in mid-2018, detailed rules on the reporting requirements were notified, under which significant beneficial owners, excluding AIFs, REITs, InvITs and domestic mutual funds, were required to make a declaration within ninety (90) days, i.e., on or before September 12, 2018, in Form Number BEN-1 to the company of their beneficial interest. As the filing requirements were unwieldy and very difficult to comply with, they were put on hold.

Nevertheless, the Ordinance has amended some of these provisions, as follows:

- If a person fails to give information regarding significant beneficial ownership in a company, the National Company Law Tribunal (the “**NCLT**”) can pass an order restricting the person’s right to transfer interest in the shares of the company or suspend all rights associated with the shares. Such an order is appealable, either by the aggrieved person or the company. Now, pursuant to the Ordinance, a limitation of one (1) year from the date of the NCLT’s order has been prescribed, i.e., if the appeal is not filed within a year’s time, the shares will be transferred to the Central Government’s Investor Education and Protection Fund; and
- If a person fails to disclose significant beneficial ownership, the person may face imprisonment of one (1) year in addition to the existing financial penalties.

These changes imply that the filing reprieve may be taken away soon, and companies will have to be ready with their data on significant beneficial ownership.

Timeline for registration of charges reduced

Currently, the Act requires every company to register a charge created on its assets within thirty (30) days of creation of the charge. Moreover, the Registrar of Companies (the “**RoC**”) has the power to condone a delay in registration of the charge if registered within three hundred (300) days of its creation. The Ordinance has revised the timelines for registration of charges as follows:

- Any charge created after November 2, 2018 can be registered within sixty (60) days of the creation of the charge, subject to payment of additional fees determined on the basis of the value of the charge proposed to be registered after the expiry of the first thirty (30) days;



- Companies will not be able to register any charge after the expiry of one hundred and twenty (120) days from the date of creation of the charge; and
- All charges created prior to November 2, 2018 have to be registered on or before, May 1, 2019.

As the details of all charges created by a company are publicly available on the website of the Ministry of Corporate Affairs once registered, registration of a charge is very important for the bank or financial institution in whose favor the charge is created and for third parties as well. There are several instances of companies not registering a charge or registering a charge on a delayed basis (as previously, companies could register a charge within three hundred (300) days of creation). The foregoing changes will ensure timely reporting and disclosure of charges by companies, which will ensure that updated records are available.

Reinstatement of declaration of commencement of business

Until May 29, 2015, prior to commencing business and/or borrowing any monies, the Act required any director of a newly incorporated company to file with the RoC, a declaration to the effect that every subscriber to the company's charter documents had paid the value of the subscribed shares as on the date of the declaration. The Indian government had done away with this requirement under the Companies (Amendment) Act, 2015.

Now, this requirement has been reinstated under the Ordinance and a format of the declaration has been notified on December 19, 2018. Therefore, all companies incorporated on or after November 2, 2018 have to file a declaration of commencement of business with the RoC. Furthermore, the RoC can initiate action to remove the name of a company from the register of companies if a company does not submit the foregoing declaration or if the ROC is satisfied that the company is not conducting any operations.

In our view, while the amendment is aimed at curbing the creation of shell companies, the reinstatement of this requirement does not do much to ensure that once the declaration is filed, a company will mandatorily commence business and continue operations.

Delegation of matters to the Regional Director to unclutter the NCLT

Pursuant to the Ordinance, the following applications will be heard and dealt with by the Regional Director instead of the NCLT:

- Applications for change of the financial year to any period other than April to March; and
- Applications for conversion of a public company to a private company and *vice versa*.

The NCLT was constituted to handle all company law matters exclusively. However, with the NCLT becoming very busy, a need was felt to reduce its workload. As the foregoing applications are technical in nature and do not involve an interpretation of company law, the Ordinance has mandated that these be handled by the Regional Director. This will allow the NCLT to hear and conclude more substantive



company law matters in an efficient manner. Having said that, it is unclear how much of the current backlog in the NCLT will be reduced.

Enhancement of the jurisdiction of the Regional Director for compounding of offences

The Ordinance has enhanced the pecuniary jurisdiction of the Regional Director for compoundable offences from INR 500,000 (Indian Rupees Five Hundred Thousand) to INR 2,500,000 (Indian Rupees Two Million Five Hundred Thousand). As the punishment for many offences has been restricted to a financial penalty, the Act has also been amended to clarify that offences will not be compoundable if imprisonment is a mandatory component of the penalty.

This change will significantly reduce the number of applications for compounding of offences filed before the NCLT and will ease the burden on the NCLT.

Revised penalties and re-categorized offences

The Ordinance has re-categorized several offences such as issuance of shares at a discount, failure to file the annual returns or financial statements, failure of a director to comply with the requirements of obtaining a director identification number, etc., as civil offences and has restricted the punishment for such offences to a monetary penalty. Further, the Ordinance has imposed an additional monetary penalty on directors and key managerial persons of the company in respect of the foregoing offences. Furthermore, the Ordinance has introduced a new provision to penalize repeat offenders with a penalty amounting to twice the amount of penalty ordinarily payable under the Act.

A major critique of the erstwhile Companies Act, 1956 was that the penalties imposed for most non-compliances were not very significant, and therefore, did not act as a deterrent. To change this, the Act imposed significant penalties for non-compliances. However, in certain instances, the penalties were not commensurate with the nature of the non-compliances. Therefore, the Indian government constituted a committee to examine the penalty provisions of the Act and give recommendations. The changes to the Act brought about by the Ordinance are based on the recommendations of the committee and are welcome, as minor non-compliances will now attract lesser penalties.